ATTORNEY FOR APPELLANT:

BRUCE W. GRAHAM
Graham Law Firm P.C.
Lafayette, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JOSEPH ROBERT DELAMATER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

WILLIAM C. WILLEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0802-CR-159
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT NO. 1
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-0003-CF-32

July 22, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, William C. Willey (Willey), appeals his sentence for child molesting, as a Class A felony, Ind. Code § 35-42-4-3.[1]

We affirm.

ISSUES

Willey presents two issues for our review, which we restate as the following three:

(1) Whether the trial court sufficiently explained the reasons for the sentence it imposed;

(2) Whether the trial court abused its discretion in finding the aggravating and mitigating circumstances; and

(3) Whether his sentence is inappropriate in light of the nature of his offense and his character.

FACTS AND PROCEDURAL HISTORY

At some time in 1999, Willey was babysitting his step-granddaughter D.J. At the time, Willey was fifty-three or fifty-four years old, and D.J. was five or six years old. D.J. was sleeping on Willey's bed, and she awoke to find Willey rubbing her privates with his hand. On March 15, 2000, D.J. reported this incident to police. When interviewed, Willey told police that he penetrated D.J.'s vagina with his finger.

On March 16, 2000, the State filed an Information charging Willey with Count I, child molesting, as a Class A felony, I.C. § 35-42-4-3, and Count II, child molesting, as a Class C

felony, I.C. § 35-42-4-3. In Count III, the State alleged that Willey is a repeat sexual offender under Indiana Code section 35-50-2-14, based on a 1988 child molesting conviction. On June 16, 2000, Willey pled guilty to Count I. Counts II and III were dismissed.

On July 6, 2000, the probation department filed its presentence investigation report, in which it recommended the maximum sentence of fifty years. On October 16, 2000, the trial court held a sentencing hearing. Willey's counsel proffered three mitigating circumstances: (1) Willey's military service; (2) the fact that Willey earned his GED; and (3) the length of time between his two child molesting convictions. In turn, the State advanced several aggravating circumstances: (1) Willey violated a position of trust; (2) his criminal history; (3) his failed attempts at rehabilitation; (4) his failure to accept responsibility for his crime; (5) his poor work history; and (6) D.J.'s age. The trial court made the following statement:

> I'm going to accept the recommendation of probation and I accept the aggravators as outlined by the prosecutor. I accept the mitigators as argued by [your] attorney, particularly, your military history and so forth. But the criminal history outweighs things. The fact you've had opportunity [sic] to switch around and I believe you're a danger to society.

(Sentencing Transcript pp. 12-13). In its written sentencing order, the trial court stated:

> The Court finds the following mitigating factors: [Willey] has obtained his GED; [Willey] has a military history.
>
> The Court finds the following aggravating factors: [Willey] has an extensive criminal history including five counts of child molesting prior to these charges. . . . The Court finds the aggravating factors outweigh the mitigating factors.

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[1] We remind Willey's counsel that he is required by Indiana Appellate Rule 46(A)(10) to include a copy of the sentencing order in his brief.

(Appellant's App. p. 6). Based on its findings, the trial court imposed a fully executed sentence of fifty years, the maximum sentence for a Class A felony.

In January 2008, the trial court granted Willey permission to file a belated appeal. Willey now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Sufficiency of the Sentencing Statement*

Willey first contends that the trial court failed to sufficiently explain its reasons for imposing the sentence that it did. Willey was sentenced in 2000, under Indiana's former presumptive sentencing scheme.[2] Under that scheme, if a trial court relies upon aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). In determining whether the trial court adequately explained the reasons for the sentence it imposes, we examine both the written sentencing order and the trial court's comments at the sentencing hearing. *Matshazi v. State*, 804 N.E.2d 1232, 1238 (Ind. Ct. App. 2004), *trans. denied*.

Here, in its written sentencing order, the trial court identified one aggravating circumstance—Willey's criminal history—and two mitigating circumstances—Willey's

[2] The current advisory sentencing scheme took effect on April 25, 2005.

military history and his GED. It also found that Willey's criminal history outweighs the mitigating circumstances. The trial court was more descriptive in its comments at the sentencing hearing. It said that it was accepting the aggravating circumstances presented by the State: (1) Willey violated a position of trust; (2) his criminal history; (3) his failed attempts at rehabilitation; (4) his failure to accept responsibility for his crime; (5) his poor work history; and (6) D.J.'s age. It also accepted the mitigating circumstances argued by Willey's attorney: (1) Willey's military service; (2) the fact that Willey earned his GED; and (3) the length of time between his two child molesting convictions. Finally, the trial court explained its reasons for imposing the maximum sentence: "But the criminal history outweighs things. The fact you've had opportunity [sic] to switch around and I believe you're a danger to society." (Sent. Tr. p. 13). While we address the propriety of the trial court's findings in the next section of our opinion, we can at least say that the trial court sufficiently explained its reasons—good or bad—for imposing the sentence that it did.

II. *Aggravators and Mitigators*

Willey next contends that the trial court abused its discretion by relying on D.J.'s age as an aggravating circumstance and by failing to find Willey's guilty plea as a mitigating circumstance. As with all sentencing decisions, the finding of aggravating and mitigating circumstances is within the discretion of the trial court and will be reversed only for an abuse of that discretion. *See Matshazi*, 804 N.E.2d at 1237-38. An abuse of discretion occurs at sentencing if the trial court's decision is clearly against the logic and effect of the facts and

circumstances before the court. *Krumm v. State*, 793 N.E.2d 1170, 1186 (Ind. Ct. App. 2003).

A. *Victim's Age as an Aggravator*

Willey argues that the trial court abused its discretion by relying upon D.J.'s age as an aggravating circumstance because the victim's age is an element of child molesting. It is true that one element of child molesting is that the victim be under fourteen years of age. *See* I.C. § 35-42-4-3. It is also true that a material element of a crime may not be used as an aggravating factor to support an enhanced sentence. *McElroy v. State*, 865 N.E.2d 584, 589 (Ind. 2007). However, when evaluating the nature of the offense, the trial court may properly consider the particularized circumstances of the factual elements as aggravating factors. *Id*. at 589-90. In *Kien v. State*, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), *reh'g denied*, *trans. denied*, we upheld the use of a child molesting victim's age as an aggravating circumstance where the victim was "a four or five-year-old child." Likewise, here, D.J. was five or six years old. The trial court did not abuse its discretion by finding D.J.'s age to be an aggravating circumstance.

B. *Guilty Plea as a Mitigator*

Willey also maintains that the trial court should have identified his guilty plea as a mitigating circumstance. As a general matter, a defendant who pleads guilty deserves to have some mitigating weight extended to the guilty plea in return. *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005). However, a trial court does not abuse its discretion in failing to find a guilty plea as a mitigating circumstance where the defendant has received a substantial

benefit in exchange for the plea. *See Sensback v. State*, 720 N.E.2d 1160, 1164-65 (Ind. 1999). Here, Willey substantially benefited from his plea by having the repeat sexual offender allegation dropped.[3] A repeat sexual offender finding could have resulted in an additional ten years on Willey's sentence. *See* I.C. § 35-50-2-14(e). Therefore, the trial court did not abuse its discretion by failing to identify Willey's guilty plea as a mitigating circumstance.

III. *Inappropriateness*

Finally, Willey argues that even if the trial court did not abuse its discretion in sentencing him, his sentence is nonetheless inappropriate. Indiana Appellate Rule 7(B) permits us to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is inappropriate in light of the nature of the offense and the character of the offender. *See* Ind. Appellate Rule 7(B); *see also Childress v. State*, 848 N.E.2d 1073, 1079 (Ind. 2006). The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress*, 848 N.E.2d at 1080.

In determining the sentence for child molesting as a Class A felony, the trial court was authorized to sentence Willey "for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more that ten (10) years subtracted for mitigating circumstances." I.C. § 35-50-2-4. It imposed a sentence of fifty years, the maximum penalty.

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[3] The State also agreed to drop Count II, child molesting as a Class C felony, but we cannot say that this was a substantial benefit for Willey. Both child molesting charges were based on the same incident, so even if

Willey compares his case to *Buchanan v. State*, 767 N.E.2d 967 (Ind. 2002). Like Willey, Buchanan received the maximum sentence of fifty years for child molesting as a Class A felony. Buchanan, who was fifty-eight, had accepted the responsibility of babysitting a five-year-old girl even though he was "aware that he was a pedophile and obsessed with young girls[.]" *Id*. at 973. "He took her and his video camera to a private location, directed her to remove her clothes, molested her by licking her vagina, and then videotaped her while she was nude." *Id*. He had two felony burglary convictions and a felony robbery conviction nearly forty years earlier and a misdemeanor public indecency conviction nearly twenty years earlier. Furthermore, he was in a position of trust with the victim, and two psychologists found him to be a sexually violent predator. Nonetheless, our supreme court found the maximum sentence of fifty years inappropriate, noting that the crime "was committed without excessive physical brutality, the use of a weapon, or resulting physical injury" and "was not part of a protracted episode of molestation but a one-time occurrence." *Id*. In addition, the court noted that Buchanan had maintained gainful employment through his adult life, had earned his G.E.D. during prior incarceration, that he suffered from health problems, and that he had family support to aid in his rehabilitation. Our supreme court concluded that Buchanan was "not within the class of offenders for whom the maximum possible sentence is appropriate" and reduced his sentence from fifty years to forty years. *Id*. at 974.

Willey had been convicted of both, there is a strong possibility that one of the convictions would have to be vacated to avoid a double jeopardy problem.

We cannot deny the substantial similarities between this case and *Buchanan*. However, we also see crucial differences between the two. First, while Buchanan had maintained gainful employment throughout his adult life, the trial court in this case found Willey's poor work history as an aggravating circumstance. In addition, Willey has consistently blamed his wife for bringing kids around even though she knew he has a problem. Even more importantly, while Buchanan's prior felonies were property crimes that occurred nearly forty years earlier, Willey was convicted of child molesting eleven years before the current offense. A prior child molesting conviction is a significant aggravator when imposing a sentence for a subsequent child molesting conviction. *See Purvis v. State*, 829 N.E.2d 572, 588-89 (Ind. Ct. App. 2005), *trans. denied*, *cert. denied*, 547 U.S. 1026 (2006). Moreover, following his first conviction, Willey failed to complete sex offender counseling—in fact, he admitted to falling asleep during a class. This is especially worrisome given that "persons who do not successfully complete offender treatment are more of a risk to re-offend." (Appellant's Green App. p. 8). Given Willey's prior child molesting conviction, his failed attempt at rehabilitation, and his failure to fully accept responsibility for his actions, the trial court was justified in labeling him a danger to society, especially children. Therefore, we cannot say that the maximum sentence is inappropriate in this case.

CONCLUSION

Based on the foregoing, we conclude that the trial court sufficiently explained its reasons for imposing the sentence that it did, that the trial court did not abuse its discretion in

its finding of aggravating and mitigating circumstances, and that Willey's sentence is not otherwise inappropriate.

Affirmed.

BAKER, C.J., and ROBB, J., concur.